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No. 85-1530

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM E. BROCK, Secretary of Labor, and
ALAN C. MCMILLAN, Regional Administrator,
Occupational Safety and Health Administration,
Appellants

v.

ROADWAY EXPRESS, INC.,

Appellee

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
AMICI CURIAE,
IN SUPPORT OF APPELLEE

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Dated: September 20, 1986

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Pursuant to Rule 36 of the Rules of this Court, American Trucking Associations, Inc. and all eleven of its affiliated trucking conferences¹ (hereinafter referred to

¹ American Movers Conference; Film, Air and Package Carriers Conference, Inc.; Interstate Carriers Conference; Munitions Carriers Conference, Inc.; National Automobile Transporters Association; National Tank Truck Carriers, Inc.; Oil Field Haulers Asso-

collectively as "ATA") respectfully submit this brief as *amici curiae* in support of appellee, Roadway Express, Inc. ATA has sought and received the written consent of the parties to file this brief *amici curiae*, and the letters of consent have been submitted to the Court.

INTEREST OF THE AMICI CURIAE

American Trucking Associations, Inc. is the national trade association of the trucking industry. Through its individual trucking company members, affiliated state trucking associations, and conferences, ATA represents every type and class of motor carrier in the United States: for-hire and private; regulated and unregulated; union and non-union.

The other parties joining American Trucking Associations in this brief are its eleven affiliated conferences which represent specialized segments of the motor carrier industry.

The trucking industry has a vital interest in the safety of our nation's highways, the public, and its employees. Accordingly, ATA has made a significant investment of time, money and manpower in this important area. For example, ATA has been a leader in seeking increased enforcement of state and federal highway safety laws, legislation requiring a single, national commercial driver's license, more comprehensive drug and alcohol testing for motor carrier employees, and retention of the 55 mph speed limit.

ATA has also played a leadership role in the area of vehicle safety. The trucking industry has strongly supported the Department of Transportation's budget request for increasing the random roadside truck inspec-

ciation, Inc.; Private Carriers Conference, Inc.; Regular Common Carriers Conference; Regional Distribution and Carriers Conference; and Specialized Carriers and Rigging Association.

tions program from \$10 million to \$50 million for fiscal year 1987.

ATA, therefore, supports the intent and concept of Section 405, Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 2305, to encourage the reporting of unsafe vehicles and safety violations.

While this case obviously has significant safety overtones, fundamentally the question presented to this Court is whether the Fifth Amendment right of parties to the guarantees of due process *prior* to government action depriving them of property will be upheld in a truck safety context.

As employers of millions of people, the trucking industry is necessarily concerned, as all employers must be, with its rights and responsibilities to discharge dishonest, disruptive employees, who may, by their attitudes and actions, compromise the integrity of the workplace and undermine the productivity and morale of fellow workers. In the case of trucking, such individuals may, in fact, endanger public safety in their roles as mechanics and drivers. Accordingly, ATA and its members have a substantial interest in the outcome of this matter.

SUMMARY OF ARGUMENT

It was Congress' intent to include due process protection for employers in § 405. The legislative history of the section, including the history of earlier legislative employee protection proposals, evidences an intent to insure employers some form of pre-reinstatement hearing. Of the many federal statutes containing employer protection provisions, the Government's implementation of § 405 stands alone in denying employers adequate due process protection.

Section 405 itself is silent on the pre-reinstatement hearing issue. The legislative history, however, strongly

shows the intent of Congress to include the requirement. Under this Court's longstanding rule to avoid unconstitutional interpretations of federal statutes when the language of the law permits a constitutional construction, the District Court's decision below is the correct one.

Finally, a pre-reinstatement hearing will not jeopardize fulfillment of the Congressional goal to encourage the reporting of safety complaints. An evidentiary hearing can easily be conducted during the investigatory period established by Congress. Thus, an unlawfully discharged employee will not suffer a prolonged period of unemployment and, correspondingly, the employee's incentive to bring safety complaints will not be deterred.

ARGUMENT

I. This Court May Avoid Deciding The Constitutional Issue In This Case By Relying On The Legislative History Of The Statute Which Manifests A Clear Intent To Provide For Due Process In § 405 Proceeding.

Section 405 on its face does not preclude a hearing prior to preliminary reinstatement, and the entire legislative history reveals the intent of Congress to provide for one.

The provisions of § 405 protecting motor carrier employees from retaliatory disciplinary actions because of safety complaints are directly traceable to several prior truck safety bills, beginning in the 95th Congress in 1978.² Under the initial bills the employee was required

² "Trucking Safety Act, "S. 2970, § 12, 95th Cong., 2nd Sess., 124 Cong. Rec. S10913 (daily ed. April 20, 1978); "Commercial Motor Vehicle Safety Act of 1979," S. 1390, § 109, 96th Cong., 1st Sess., 125 Cong. Rec. S10920 (daily ed. June 21, 1979); "Trucking Competition and Safety Act of 1979," S. 1400, § 226, 96th Cong., 1st Sess., 125 Cong. Rec. 16352, (daily ed. June 25, 1979); "Commercial Motor Vehicle Safety Act of 1980," H.R. 6398, § 109, 96th Cong., 2nd Sess., 126 Cong. Rec. 1530 (daily ed. January 31, 1980).

to seek redress through legal action in United States District Court.³ Thus, both the carrier and the employee would have received due process in a court of competent jurisdiction prior to the issuance of a reinstatement order.

Two years later, S. 1390, as passed by the Senate in 1980, created the right to seek redress before the Secretary of Labor, in lieu of costly court litigation. However, under the revision, the employer was still to be entitled to a hearing prior to the issuance of a reinstatement order. The bill provided that the Secretary, if after receiving a complaint and conducting a preliminary investigation, should conclude "that there is reasonable cause to believe that a violation has occurred, he shall accompany his [investigatory] findings with a *proposed* order providing the relief prescribed [in the statute]. Thereafter, either the person alleged to have committed the violation or the complainant may, within 30 days, file objections to the proposed order and request a hearing on the record." [Emphasis supplied.] S. 1390, § 109.

As the 97th Congress waned, the legislation at issue here was introduced. In the House, "The Surface Transportation Assistance Act," H.R. 6211, passed on December 6, 1982 without any employee protection provisions. S. 3044, the Senate version of the same act, was introduced by Senator Packwood on December 7, 1982 and included such provisions (§ 409, later § 405). The section tracked the one that had passed the Senate in S. 1390 in the previous Congress and contained *due process procedures*. On December 19, 1982, Senator Danforth spoke in favor of the bill and commented specifically on the protections for employers. 128 Cong. Rec. S15610 (daily ed. December 19, 1982).

Thus, all of the statements and testimony spanning three Congresses cited in favor of the safety statute were, in fact, supporting a procedure which gave the employer

³ S. 2970, S. 1390, as introduced and S. 1400.

rights to cross-examine witnesses and present its evidence to challenge reinstatement demands.⁴

The Congressional Record is silent as to why, after five years of careful consideration, the legislation was suddenly changed to delete due process procedures when S. 3044 was passed by the Senate on December 21, 1982. For the first time, a requirement of "preliminary reinstatement" instead of a "proposed order" appealable to the Secretary of Labor was inserted in the bill.

However, when this provision as rewritten was accepted in the Conference between the Senate and the House later on the same day, it is evident the Conferees thought they were accepting and voting on the previous provision with its due process procedures. The Conference Report on H.R. 6211, which became the bill enacted by both Chambers, undebatably describes the statutory provision which contained the "proposed order" procedure *not* the "preliminary reinstatement" procedure inserted inexplicably in the statute:

Subsection (c) provides the procedure an employee may follow if the employee believes he has been discriminated against, disciplined or discharged in violation of subsection (a) or (b). An employee may file a complaint within 180 days after the alleged violation occurs with the Secretary of Labor. The Secretary of Labor is then required to conduct an investigation within 60 days of receipt of a complaint and report his findings and conclusions to the affected parties. If the Secretary of Labor determines that there is reasonable cause to believe that

⁴ No other version of § 405 was introduced between December 7, 1982 and December 21, 1982, the date S. 3044 passed the Senate. The section-by-section analysis submitted by Senator Baker on December 14, 1982 and quoted by the Government in its brief (Gov't. Br. p. 33) was also in support of the original provision requiring the Secretary to hold a hearing on a *proposed* order prior to reinstatement. 128 Cong. Rec. S14648 (daily ed. Dec. 14, 1982).

the complaint has merit, he shall notify the complainant and the person alleged to have committed the violation. Thereafter, either the person alleged to have committed the violation or the complainant may, *within 30 days file objections to the proposed order and request a hearing on record*. Where a hearing is not timely requested, the Secretary shall issue a final order not subject to judicial review . . . [Emphasis provided.]

128 Cong. Rec. H10826 (daily ed. December 21, 1982).

That Congress intended to include employer due process protection in the "Protection of Employees" provisions embodied in § 405 is clear. Since the statute can fairly be read to include such constitutionally-mandated protection for employers, the District Court was correct in enjoining appellants from issuing a preliminary reinstatement order prior to holding an evidentiary hearing.

This Court has stated that as a "cardinal principle," it will "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982), (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "An Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979); see also *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804). Before determining that the statute violates the Constitution, "there must be present the affirmative intention of the Congress clearly expressed" that Congress intended the statute to be so applied. *N.L.R.B. v. Catholic Bishop of Chicago*, *supra* at 500.

In attempting to determine Congress' intent, this Court first looks to the statute. *Greyhound Corp. v. Mt. Hood*, 437 U.S. 322, 330 (1978). In this case, the statute itself

is silent on the issue of a pre-reinstatement hearing. Where there is no clear expression of the intention of Congress in the statute, the Court must examine the legislative history of the Act to determine the Congressional intent. *N.L.R.B. v. Catholic Bishop of Chicago, supra*, at 504; *Rose v. Lundy*, 455 U.S. 509 (1982).

As illustrated above, Congress has consistently expressed an intent to provide employers with some form of pre-reinstatement hearing in § 405 proceedings. By relying on this legislative history, the Court may avoid resolving the Constitutional issue and affirm the decision of the District Court.

II. The Other Major Federal Statutes Which Contain Employee Protection Provisions All Require Some Form of Due Process Prior To Reinstatement.

The Secretary of Labor's interpretation of § 405 of the STAA constitutes an anomaly when compared with the other major federal statutes containing employee protection provisions and should not be allowed to stand.

Fourteen major acts of Congress provide for employee protection when bringing law violations to public attention. All require that due process procedures be followed before an employee may be reinstated and compensated for wrongful discharge. Under eight statutes, an agency hearing pursuant to the Administrative Procedures Act, 5 U.S.C. § 554, must be conducted before the employee may be ordered reinstated.⁵ Five other federal laws require the employee or the agency to bring an action in federal district court to enforce the employee protection

⁵ National Labor Relations Act, 29 U.S.C. § 160; Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610; Toxic Substance Control Act, 15 U.S.C. § 2622; Federal Water Pollution Control Act, 33 U.S.C., § 1367; Energy Reorganization Act, 42 U.S.C. § 5851; Solid Waste Disposal Act, 42 U.S.C. § 6971; Clean Air Act, 42 U.S.C. § 7622; and Surface Mining Act, 30 U.S.C. § 1293.

provisions of these enactments, and again, only after a trial on the merits, may the employee's discharge or disciplinary action be reversed.⁶

Perhaps the statute most analogous to the one at issue here is the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. Pursuant to this law, a miner who believes he or she has been wrongfully discharged may file a complaint with the Secretary of Labor. Upon receiving the complaint, the Secretary, after forwarding a copy to the employer, must investigate the matter to determine whether the case was frivolously brought. If the Secretary finds that the complaint is not frivolous, the employee must be immediately reinstated pending final order on the complaint 30 U.S.C. § 815(c)(2). The statute makes no explicit provision for a hearing prior to the issuance of the temporary reinstatement order.

Pursuant to this statute, the Federal Mine Safety and Health Review Commission promulgated Rule 44, 29 C.F.R. Part 2700.44, which provided for a temporary reinstatement order on the basis of an investigator's recommendation. The employer could then request a hearing to contest the order, which had to be held *within 5 days*.

In *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *reh'g denied*, 781 F.2d 57 (6th Cir. 1986), the court held that the procedures adopted by the Commission were an unconstitutional deprivation of mine operators' due process rights in that they failed to insure any reasonable opportunity for at least some minimal evidentiary hearing *before* temporary reinstatement. Since the statute itself could be read in a constitutional manner, the court of appeals was able to limit its review to the unconstitutional rule.

⁶ Fair Labor Standards Act, 29 U.S.C. §§ 215, 216; Employee Retirement Insurance Security Act, 29 U.S.C. §§ 1132, 1140; Occupational Safety and Health Act, 29 U.S.C. § 660; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-3, 5; and Safe Containers For International Cargo Act, 46 U.S.C. § 1506.

In short, § 405 would stand alone in denying employers due process rights provided in fourteen major federal statutes should the decision of the lower court be reversed. There simply is no valid rationale to distinguish this section from those others protecting similar rights that would somehow require a different result.

III. A Pre-Reinstatement Hearing Need Not Prolong A Wrongfully-Discharged Employee's Temporary Unemployment Or Present An Undue Administrative Burden To The Government.

Contrary to the assertions of the government (Gov't Br., p. 36) and *amicus curiae* for appellants, Teamsters for a Democratic Union (TDU Br., p. 8-9), a pre-reinstatement hearing need not prolong a wrongfully-discharged employee's unemployment. Under the current statute, the Secretary of Labor must conduct an investigation and make an initial determination whether there is reason to believe the complaint has merit within sixty days after receiving it. During this investigative period, the discharged employee may be out of work. From a practical viewpoint, there is no reason why some kind of an evidentiary hearing that comports with due process cannot be conducted within this time frame so that the complainant's unemployment, if it is unjustified, will not be prolonged. Correspondingly, the employee's incentive to bring safety complaints would not be deterred.

For example, under the revised Rule 44 implementing the Federal Mine Safety and Health Act of 1977, 29 C.F.R. 2700.44, published earlier this year, (51 Fed. Reg. 16024, April 30, 1986), the Secretary of Labor must hold an evidentiary hearing in response to a complaint *within 10 days* and make a determination whether the employee should be temporarily reinstated.⁷ The employer is given the opportunity to cross-examine any witnesses and pre-

⁷ In pertinent part, Rule 44 now reads:

(b) Request for hearing. Within 10 days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Com-

sent testimony and documentary evidence in support of its own position. Section 405 gives the Secretary six times as long—60 days—to conduct a similar hearing.

Nor would the Department of Labor's resources be overtaxed by having to conduct such hearings. Based on the following historical experience with the statute, since FY 1984, the Secretary has found merit on average in fewer than 50 complaints a year.⁸ Thus, the number of instances where a hearing would be required prior to reinstatement (see column headed "Found to Have Merit") are minimal:

	Complaints Pending as of Oct. 1 of Fis. Yr.	New Com- plaints	With- drawn	Settled	Found to Have Merit	Dis- missed
FY 1984	35	354	100	35	25	25
FY 1985	216	469	211	97	34	175
FY 1986 (as of June 30)	109	446	137	58	54	84

Source: OSHA Monthly Activity Reports, Sept. 1984; Sept. 1985; and June 1986.

mission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint is not frivolously brought, he shall issue immediately an order of temporary reinstatement. If a hearing on the application is requested, the hearing shall be held within 10 days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

⁸ The OSHA Monthly Reports do not indicate how many "merit" determinations involve cases of discharge and how many concern other types of disciplinary or discriminatory actions not involving discharge.

Motor carriers have a material property interest in not being required to reinstate a disruptive employee. The government argues that the employer will not suffer an economic loss as a result of a preliminary reinstatement order because it will be receiving the employee's labors during the term of the reinstatement (Gov't. Br., p. 26). However, appellants ignore the disruptive nature of such a requirement and its impact on productivity, quality, and the morale of other workers.

In trucking, the forced rehiring, for example, of an incompetent or dangerously careless employee may present a possible safety hazard to other employees and the general public—the motor carrier employer must bear the responsibility and liability of having such an employee operating its trucks, and the public must bear the risk of having him on the highways.⁹

Nor is the period of reinstatement necessarily short. Under the statute, there is *no* time limit within which the Secretary must hold a hearing after the preliminary reinstatement order is issued, and the Secretary has 120 days *after* the hearing to issue a final decision, 49 U.S.C. § 2305(c) (2). Thus, a carrier could be forced to reemploy an unsatisfactory employee for a minimum of six months to over a year.

The disruptive cost of reinstating such employees has been recognized by this Court in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) wherein Justice Powell in a concurring opinion stated:

⁹ Three recent studies indicate that 95% of truck accidents are caused by driver error, rather than vehicle defects: *Study of Car/Truck Crashes in the United States*, Univ. of Mich. Highway Safety Research Institute (May 1982); *Accidents of Motor Carriers of Property 1984*; U.S. Dept. of Transportation (May 1986); and *Identification of Preventable Commercial Accidents and Their Causes*, Mandex, Inc., on behalf of Federal Highway Administration (Sept. 1985).

Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.

See also Southern Ohio Coal Co., supra at 703, where the court found "compelling" the employer's interest in "not being required to employ in a sensitive position [section foreman] a man whom it has discharged." The operation of an eighteen wheel truck on the nation's highways must be considered such a "sensitive position."

In comparing the cost of conducting the constitutionally required evidentiary hearing, to the substantial cost to employers of having to reinstate an unsatisfactory employee, we believe the equitable as well as the legal balance weighs in favor of requiring a pre-reinstatement hearing.

CONCLUSION

ATA respectfully urges that the decision and order of the District Court be affirmed.

Respectfully submitted,

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